RECORD AND BRIEFS

No. 15-1204

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT LEGAL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, two organizations with a long history of defending immigrants' rights, submit this brief to provide an independent basis for affirming the District Court's injunction with respect to immigrants raising a substantial defense to the entry of a removal order. *Amici* fully agree with Respondents' arguments in favor of affirming the District Court's injunction in this case. But, as *amici* explain here, even if the Court declines to affirm the judgment below, the Court should nevertheless grant relief to the thousands of immigrant detainees asserting a substantial defense to removal by affirming the injunction in part.

The National Immigration Project of the National Lawyers Guild ("NLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct. It also is the author of *Immigration Law and Crimes* and three other treatises. The NLG has participated as *amicus curiae* in several

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of amicus briefs are on file with the Clerk.

significant immigration-related cases before this Court. *See, e.g., Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010). Through its membership network and its litigation, the NLG is knowledgeable about the problems faced by immigrants subject to prolonged detention without bond hearings.

The Immigrant Legal Resource Center ("ILRC") is a non-profit center and national leader in the area of the immigration consequences of criminal convictions. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, and other groups. It has published manuals on the immigration consequences of crimes, and it has regularly filed amicus briefs in this Court in important immigration cases. *See, e.g., Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). Through its work, the ILRC has developed a strong interest in the issue of prolonged detention.

INTRODUCTION AND SUMMARY

The government claims that Sections 1225(b) and 1226(c)[2] authorize the detention of certain immigrants without any temporal limitation *and* without the provision of a bond hearing before a neutral decision-maker. The District Court rejected this extreme position as raising serious due-process concerns and construed the statute to require bond hearings after six months of detention. The Ninth Circuit affirmed. *Amici* urge the Court to

2. These statutes are codified in Title 8 of the United States Code.

affirm the injunction in full for the reasons Respondents provide in their initial and supplemental briefs. *Amici* write separately to argue that the due-process rights of immigrants raising a substantial defense to removal offer an independent basis for affirming the injunction in part. If the Court declines to affirm the injunction in full, it should nevertheless affirm it in part for the reasons given here.[3]

Outside of the criminal-justice system, our Constitution permits detention only under narrow, carefully limited circumstances. To protect against capricious detention, Anglo-American law has, for centuries, required the Executive to demonstrate at a hearing before a neutral decision-maker that an individual's civil detention is necessary to serve a valid government purpose. This Court has repeatedly enforced these rules against executive-branch efforts to subject individuals to civil detention without due process of law. *E.g.*, *Foucha v. Louisiana*, 504 U.S. 71(1992); *Addington v. Texas*, 441 U.S. 418 (1979).

Here, however, the government claims that Sections 1225(b) and 1226(c) authorize the detention of certain immigrants without any temporal limitation *and* without the provision of a bond hearing before a neutral decision-maker. The government claims that the categorical denial of bond hearings to Class members is justified by its interests in preventing flight and protecting public safety. *Amici* agree with Respondents that detention without a bond hearing becomes prolonged and violates due process

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3. *Amici* interchangeably use the terms "substantial defense to removal" and "substantial defense to a removal order."

after six months. For that reason, *amici* urge the Court to affirm the District Court's injunction requiring the provision of bond hearings to immigrants subject to prolonged immigration detention.

Amici write separately to provide an alternative justification for affirming the injunction in part. As Justice Breyer recognized in *Demore v. Kim*, 538 U.S. 510 (2003), an immigrant with a defense to removal that is "neither insubstantial nor interposed solely for purposes for delay" has "strong" "constitutional claims to bail." *Id.* at 577 (Breyer, J., concurring in part and dissenting in part). In this brief, *amici* identify those defenses and show why the individuals who assert them have a strong constitutional claim to bond.

I.A. Many immigrants have a defense to the government's attempt to remove them from the United States that is "neither insubstantial nor interposed solely for purposes of delay." *Id.* Some immigrants prevail simply because the government is unable to prove its charge of removability. Others obtain a form of relief from removal such as, for example, cancellation of removal or asylum. An immigrant who prevails on a claim for relief retains or acquires lawful permanent resident status (or a pathway thereto). When an immigrant successfully defends against the government's charge of removability or obtains relief from removal, she defeats the government's effort to obtain a removal order. The majority of Class members raise a substantial defense to removal.

Class members who raise a substantial defense to removal are uniquely vulnerable to prolonged detention. Preparing, presenting, and considering a substantial

defense to removal require time and resources. The Nation's overwhelmed Immigration Courts lack both, leaving Class members with a substantial defense to removal to languish in detention while their claims are adjudicated.

I.B. To prevail here, the government must demonstrate that the categorical denial of bond hearings to Class members is reasonably related to the purpose of Class members' detention. The government cites two interests: preventing flight and protecting public safety. But neither justification is availing in light of the "strong" "constitutional claims to bail" possessed by immigrants asserting a substantial defense to removal. *Id.*

Immigrants raising a substantial defense to removal are particularly unlikely to pose a flight risk. These individuals have powerful incentives to submit to the Immigration Court's jurisdiction because they are able to obtain or retain lawful permanent resident status if they prevail. Moreover, electronic monitoring can mitigate the risk of flight without resorting to detention.

Additionally, detaining individuals with a substantial defense to removal is not reasonably related to protecting public safety. Congress has made immigrants with serious criminal convictions ineligible to apply for most forms of immigration relief. An immigrant cannot raise a substantial defense to a removal order if she clearly possesses a disqualifying conviction. Immigrants raising a substantial defense to removal are thus the Class members least likely to endanger the public. The Constitution cannot tolerate the prolonged detention of such individuals without a bond hearing.

I.C. A bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding. An immigrant at liberty is better able to secure legal counsel and to assist in preparing her defense. For an immigrant asserting a substantial defense to removal, release from detention may mean the difference between remaining in the United States and being removed to an unfamiliar—and potentially dangerous—country.

I.D. Immigrants may seek a hearing in immigration court to determine if they are properly classified under the mandatory-detention statute. But that hearing does not adequately safeguard the due-process rights of immigrants raising a substantial defense to removal. The *Joseph* standard[4] used in those hearings does not allow the Immigration Judge to consider whether an immigrant has even an obvious claim to relief from removal. And while *Joseph* allows the Immigration Judge to consider the threshold issue of removability, it violates due process by impermissibly placing the burden of persuasion on the immigrant. Most important, a *Joseph* hearing is no substitute for an individualized hearing on flight risk and danger—the touchstone of this Court's due-process jurisprudence.

II. *Demore* did not consider whether an immigrant with a substantial defense to removal has a due-process right to a bond hearing. In *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld the mandatory detention of a lawful permanent resident who conceded that he

4. *See Matter of Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999).

was removable but requested withholding of removal. An immigrant who, like Kim, seeks only withholding of removal necessarily accepts the entry of a removal order. Therefore, this Court in *Demore* had no occasion to consider the constitutional implications of detaining an immigrant raising a substantial defense to the entry of a removal order. Accordingly, *Demore* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable." *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019–20 (7th Cir. 2004).

III. The Court should affirm the District Court's injunction for the reasons provided by Respondents and to protect the due-process rights of immigrants asserting substantial defenses to removal. If the Court declines to affirm the injunction in full, it should affirm it in part so that immigrants with such defenses receive a bond hearing after no later than six months of immigration detention.

ARGUMENT

I. Immigrant detainees raising a substantial defense to removal have a due-process right to a bond hearing.

To comport with the Constitution, civil detention must bear a reasonable relationship to its purpose. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see also* Resp. Supp. Br. at 17–18. Here, the prolonged detention, without possibility of bond, of an immigrant who raises a substantial defense to removal does not bear a reasonable relationship to the asserted government interests.

A. Most Class members raise a substantial defense to removal—and are therefore especially likely to suffer prolonged detention triggering due-process concerns.

The overwhelming majority of Class members have raised a substantial defense to removal by challenging the charge of removability or demonstrating statutory eligibility for relief from removal. Ironically, however, the very fact that they have meritorious defenses renders them more vulnerable to prolonged detention because it takes more time to prepare and adjudicate these complex cases. Accordingly, these are precisely the immigrants for whom the risk of a due-process violation is highest.

1. The overwhelming majority of Class members have a substantial defense to removal.

An immigrant may defend against the entry of a removal order in one of two ways.

First, she may seek to defeat the government's initial charge of removability. If the government cannot carry its burden of proving the charge of removability, the Immigration Judge must terminate proceedings. *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966); 8 C.F.R. § 1240.8(a);

Second, even if she is unable to defeat the government's charge of removability, an immigrant may obtain permanent relief from removal. Examples of such relief include cancellation of removal, adjustment of status to that of a lawful permanent resident, and asylum.[5]

5. *See* 8 U.S.C. § 1229b (criteria for cancellation of removal); *id.* at § 1255 (adjustment of status); *id.* at § 1158 (asylum).

If an immigrant prevails *either* by defeating an initial charge of removability *or* by obtaining permanent relief from removal, proceedings terminate without the entry of a removal order, and any immigrant who obtains relief from removal leaves the courthouse a lawful permanent resident or with an avenue to acquire that status. *In re Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967).

The overwhelming majority of detained Class members raise a substantial defense to removal. While some raise a substantial defense to the government's threshold charge of removability, most seek relief from removal. Seventy percent of Mandatory Subclass members were eligible and applied for cancellation of removal.[6] J.A. 95 tbl. 23; Resp. Supp. Br. at 34 n.10. To be statutorily eligible for this relief, a lawful permanent resident must demonstrate that she has continuously resided in the United States for at least seven years, been a lawful permanent resident for at least five years, and not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). An immigrant who is able to meet these requirements and who has filed an application for cancellation has raised a substantial defense to removal.

Similarly, over ninety percent of Arriving Subclass members had a "credible" asylum case.[7] 8 U.S.C. § 1225(b)

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6. The District Court certified two Subclasses relevant here: a Mandatory Subclass of immigrants detained under color of Section 1226(c) and an Arriving Subclass of immigrants detained under color of Section 1225(b). *Amici* agree with Respondents that members of the Arriving Subclass members are protected by due-process requirements. Resp. Supp. Br. at 19; *see Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

7. *See, e.g.*, J.A. 98, tbl.28; J.A. 99; J.A. 135, tbl.38.

(1)(B)(v). Government officials interviewed these Subclass members and determined that each had a "significant possibility" of "establish[ing] eligibility for asylum." *Id.* Like the statutorily eligible cancellation applicant, an immigrant whom the government has "screened in" as having a potentially meritorious asylum claim raises a substantial defense to removal. And for reasons discussed below, these individuals have a particularly strong claim to a bond hearing.

2. Immigrants who have substantial defenses to removal are especially likely to suffer prolonged detention in violation of their due-process rights.

Immigrants who raise a substantial defense to removal are more likely than Class members generally to experience prolonged detention unless granted a bond hearing.

A Class member who asserts a substantial defense to removal is more likely to experience prolonged detention because meritorious litigation takes longer to complete than less complex litigation. J.A. at 80–81; *see* Brief of Nine Retired Immigration Judges at 17 (hereinafter "IJ Br."). It takes time for the immigrant to prepare her case and for the government to oppose it. These cases require "careful legal analysis and thorough factual review" from the Nation's Immigration Judges, an overburdened group of officials facing crushing caseloads. IJ Br. at 18.

Immigration Judges carry an average caseload of 1,900 cases. *Id.* at 20. They lack necessary support staff; indeed, there are even fewer chambers clerks than

Immigration Judges. Andrew Taw-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 Wm. & Mary L. Rev. 581, 611 (2013). This lack of resources has contributed a growing backlog of cases, which in turn will lead to Class members having to wait longer for their cases to be adjudicated. *Id.* at 610–11. And this already dismal situation is set to become worse because the government has instituted a hiring freeze that is likely to preclude the hiring of additional Immigration Judges.[8]

B. Categorically subjecting individuals with a substantial defense to removal to prolonged detention without a bond hearing is not reasonably related to the government's asserted interests.

"[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. The government asserts two interests to justify prolonged detention under Sections 1225(b) and 1226(c): preventing the immigrant's flight and preserving public safety. Petr. Supp. Br. at 31. But neither rationale is "reasonabl[y] related" to refusing to grant an individualized bond hearing to immigrants with a substantial defense to removal. *Jackson*, 406 U.S. at 738.

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8. Presidential Memorandum Regarding the Hiring Freeze (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze.

1. Categorical denial of bond hearings is not reasonably related to preventing flight.

There is no reasonable relationship between preventing flight and denying a bond hearing to an immigrant with a substantial defense to removal who faces prolonged detention. "[A]s a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk." *United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989). Or, put another way, an immigrant who has much to gain from attending her removal proceeding is far more likely to comply with immigration authorities. Here, an immigrant raising a substantial defense to removal does have much to gain—lawful permanent-resident status or a short pathway to it—as a result of her removal proceedings. *See supra*, p. 9.

The ample rights that Congress has conferred upon lawful permanent residents serve as a powerful set of incentives to attend removal proceedings. Lawful permanent residents have indefinite permission to reside in the United States and they become eligible to apply for citizenship five years after obtaining permanent-resident status.[9] They are entitled to work in the United States on virtually the same terms as citizens, are eligible for federal financial aid for post-secondary education, and may petition for certain family members to immigrate to the United States.[10] Compared to individuals with no chance

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9. 8 U.S.C. § 1427(a). Spouses of U.S. citizens may naturalize even sooner. *Id.* at § 1430(a).

10. 8 U.S.C. § 1324(a)(h)(3) (employment authorization); 34 C.F.R. § 668.33(a)(2)(i) (financial-aid eligibility); 8 U.S.C. § 1153(a)(2) (authorization to petition for immigrant relatives).

of defending against a removal order, immigrants on the threshold of gaining this panoply of rights are far more likely to submit to the jurisdiction of the Immigration Court.

Immigrants asserting two defenses to removal that are very common amongst Class members—asylum and cancellation of removal—are particularly incentivized to attend their removal proceedings. For asylum seekers, the right to remain in the United States may be the difference between life and "death or persecution if forced to return to his or her home country." *I.N.S. v. Cardoza-Fonseca*, 480 US. 421, 449 (1987). An immigrant who fails to appear in Immigration Court may forfeit forever the opportunity to present her asylum claim and avoid removal to an unsafe country. Immigration Judges issue *in absentia* removal orders whenever an immigrant fails to appear. 8 U.S.C. § 1158(d)(5)(A)(v); *id.* at § 1229a(b)(5)(C)(i). Relief from such orders is only narrowly available, *id.*, and the government has promulgated a regulation barring many removed immigrants from later seeking asylum. 8 C.F.R. § 1208.31(e). Thus, an immigrant seeking asylum has strong incentives to appear at her removal proceedings because a failure to do so may waive her ability to present her claim.

Likewise, an immigrant able to assert a substantial claim to cancellation of removal usually poses a much-reduced flight risk because she has "extensive ties in the community" and "close relationship[s]" to U.S. citizens and lawful permanent residents. *Troung Dinh Hung v. United States*, 439 U.S. 1326, 1329 (1978) (Brennan, J., in

chambers). To be eligible to apply for this form of relief,[11] lawful permanent residents must demonstrate seven years of continuous residence in the United States, including five as a lawful permanent resident. 8 U.S.C. § 1229b(a)(2). As Justice Brennan noted in *Troung Dinh Hung*, individuals with such strong ties to the United States are particularly unlikely to abscond. 439 U.S. at 1329 (Brennan, J., in chambers). And, like the asylum applicant who absconds, the cancellation applicant who fails to appear forfeits her opportunity to obtain relief that would enable her to retain the "family, social, and economic ties" that lawful permanent residents develop to the United States and its citizens. *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966).

The availability of alternatives to detention also shows why the government's categorical denial of bond hearings is unreasonable. Immigration authorities operate the Intensive Supervision and Appearance Program (ISAP), which releases individuals into the community under electronic supervision. The government's most knowledgeable witness testified that in one Southern California service area virtually 100% of ISAP participants appeared at their removal hearings, and he estimated that compliance in the Los Angeles service area reached 90%. J.A. 564–65. This alternative further demonstrates that detention is not necessary to prevent the flight of an immigrant with a substantial defense to removal.

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11. Cancellation of removal was the most common type of relief that Class members sought. J.A. at 78.

2. Categorical denial of bond hearings is not reasonably related to protecting public safety.

Similarly, there is no reasonable relationship between protecting public safety and denying a bond hearing to an immigrant with a substantial defense to removal who faces prolonged detention. A Class member with a conviction serious enough to make her ineligible for relief from removal would not have a substantial defense from removal. By contrast, Congress specifically *preserved* the possibility of relief for immigrants whose criminal convictions render them removable but are not so serious as to render them categorically unfit to obtain relief from removal. Individuals falling into this latter category may be able to raise a substantial defense to removal; and it is illogical to assume that they categorically threaten public safety, given Congress's intent to give each of them the opportunity to apply for relief from removal.

Congress already has eliminated removal defenses for most people who could pose a threat to public safety. For instance, asylum is unavailable to any individual who has been convicted of a "particularly serious crime,"[12] a serious non-political crime,[13] or an aggravated felony.[14] Likewise, asylum is unavailable to any individual who has persecuted

12. 8 U.S.C. at § 1158(b)(2)(A)(ii).

13. *Id.* at § 1158(b)(1)(A)(iii).

14. *Id.* at § 1158(b)(2)(B)(i).

others[15] or been found to be involved in terrorist activity[16] or to pose a danger to the security of the United States.[17] As this wide range of descriptions suggests, an individual who poses a danger to the community is likely to be barred from raising a claim to asylum.

Congress also has precluded many individuals with serious criminal offenses from obtaining cancellation of removal. A lawful permanent resident cannot obtain cancellation unless she can prove that she has never been convicted of an aggravated felony.[18] And an immigrant who is not a lawful permanent resident may obtain cancellation of removal only if she can show that she possesses good moral character *and* can establish that she has not been convicted of a crime involving moral turpitude, an offense related a controlled substance or firearms, or an aggravated felony.[19] Because of these bars, an individual who poses a danger to the community could not raise a substantial defense to removal.

These prohibitions demonstrate the unreasonable nature of the government's categorical denial of a bond hearing to Class members, at least insofar as that denial affects immigrants with a substantial defense to removal. Immigrants with lesser convictions are the only Class members able to raise a substantial defense to removal.

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15. *Id.* at § 1158(b)(2)(A)(i).

16. *Id.* at § 1158(b)(1)(A)(v).

17. *Id.* at § 1158(b)(1)(A)(iv).

18. *Id.* at § 1229b(a)(3).

19. *Id.* at § 1229b(b)(1)(B)&(C).

The government's public-safety justification rings hollow given the specific eligibility criteria governing relief from removal.

C. A bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding.

An immigrant with a substantial defense to removal may win release after a proper bond hearing.[20] And once released, that immigrant is far more likely to participate effectively in her removal proceedings.

The reason is simple. An immigrant at liberty is better able to prepare and present her defense to the Immigration Court. In the criminal-justice system, the "traditional right to freedom before conviction permits the unhampered preparation of a defense." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). For at least two reasons, this reasoning applies equally to immigration proceedings, which may culminate in the "particularly severe 'penalty'" of removal. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

First, detained immigrants are far less likely than non-detained immigrants to secure legal representation. While the Constitution requires the government to provide criminal defendants with legal representation, *Gideon*

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20. *Amici* address why a hearing conducted under *In re Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999), is not a bond hearing *infra* at pp. 20-22.

v. Wainwright, 372 U.S. 335 (1963), this Court has not yet recognized a constitutional entitlement to counsel in immigration proceedings. Thus, liberty prior to removal becomes a far more important factor in determining whether an immigrant is likely to retain a lawyer. Non-detained immigrants are almost *five times* more likely than detained immigrants to have legal representation.[21] And this difference matters, because the outcome of the proceeding often turns on whether an immigrant has a lawyer. A recent study of New York-area immigration courts shows that detained immigrants with counsel are *six times* more likely than unrepresented detainees to obtain some form of relief from removal.[22] A study of San Francisco immigration courts reached a similar conclusion.[23] Accordingly, an immigrant's ability to obtain counsel—which may hinge entirely upon whether the individual is at liberty—often determines whether the immigrant will earn the right to remain in the United States or face "the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

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21. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 31 (2015).

22. N.Y. Immigrant Representation Study Report, Accessing Justice; The Availability and Adequacy of Counsel in Immigration Proceedings at 3 (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

23. Represented detainees in San Francisco were more than three times more likely to prevail in their removal cases compared to unrepresented detainees. Northern California Collaborative for Immigrant Justice, Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California at 9 (Oct. 2014), http://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf.

Second, the unique nature of removal proceedings disadvantages immigrants who proceed without counsel. Asylum seekers, for example, may need to obtain psychological evaluations, witness statements, and information about conditions in their home country. *See* 8 U.S.C. § 1158(b)(1)(B)(ii). To accomplish these tasks, asylum seekers may need to communicate with people in the home country, an especially difficult job from a detention facility. Likewise, an applicant for cancellation of removal may need to secure hard-to-obtain documentation to prove her continuous presence in the United States or to establish that she has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(b)(1)(D). *See* IJ Br. at 13 (noting that "[p]rolonged detention hobbles . . . detainees' attempts to clearly present issues to the immigration court"). Thus, a detained immigrant preparing this type of fact-intensive defense without the aid of counsel is doubly disadvantaged by detention because she can neither retain a lawyer nor gather the evidence necessary to prove her defense.[24]

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24. For these same reasons, the Court should reject the government's argument that Class members with criminal convictions who seek discretionary relief from removal somehow have a diminished liberty interest. Petr. Supp. Br. at 35. The government claims that an immigrant's removability is often established "beyond dispute" by a judgment of conviction. Not so. The legal analysis governing this determination is difficult even for the Courts of Appeal to administer. *See, e.g.*, *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013). Immigration Judges and the Board of Immigration Appeals also struggle with this area of law, and the Courts of Appeals regularly reverse removal orders in cases involving detained immigrants. *See e.g.*, *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015) (vacating removal order of detained lawful permanent resident); *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014) (same). As Justice Breyer noted in *Demore*, this area of law can give rise easily to a defense from removal

Accordingly, a bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding.

D. The availability of a *Joseph* hearing does not save Section 1226(c) from constitutional challenge.

The government's attempt to present *Joseph* hearings as a safeguard against arbitrary detention is unpersuasive because those hearings utterly fail to protect the due-process rights of immigrants asserting a substantial defense to a removal order. *See* Petr. Supp. Br. at 7, 11–12.

Immigration Judges conduct *Joseph* hearings to determine whether individuals who have been subjected to mandatory detention under Section 1226(c) are in fact properly subject to the statute. 8 C.F.R. § 1003.19(h)(2)(ii). But the standard imposed by *Joseph* hearings is virtually impossible to meet: An individual must demonstrate that the government is "substantially unlikely to establish" the charges that allegedly render the individual subject to mandatory detention. *In re Joseph*, 22 I. & N. Dec. 799, 806

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that is "neither insubstantial nor interposed solely for purposes of delay." *Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part).

Moreover, the discretionary nature of relief from removal is irrelevant to whether an immigrant should be afforded the right to seek counsel. Petr. Supp. Br. at 36. Congress has specifically provided immigrants the right to secure legal representation for all phases of a removal proceeding. 8 U.S.C. § 1229a(b)(4)(A). Freedom from prolonged detention aids the immigrant in availing herself of that right.

(BIA 1999). As a practical matter, this means that unless the government's charges are frivolous, an immigrant subjected to mandatory detention cannot prevail—no matter how strong a claim she may have that she will ultimately not be ordered removed.

The *Joseph* standard is deeply flawed on two levels. Substantively, *Joseph* asks the wrong question because it focuses narrowly only on whether an immigrant is *removable* as a threshold matter, rather than whether an immigrant is likely to *avoid a removal order,* which she may do either by successfully challenging the charge or by establishing eligibility for one of the forms of permanent relief from removal. *See* J.A. 322 (testimony of Assistant Chief Immigration Judge). A broader inquiry that takes into account all of a detainee's potential defenses to removal would "strike[] the best balance between an alien's liberty interest and the government's interest in regulating immigration." *Tijani v. Willis*, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring).

Second, the *Joseph* standard is flawed because, rather than requiring the government to justify continued detention, it forces the *immigrant* to justify release, and does so by imposing a standard that, as noted above, is virtually impossible to meet.[25] Thus, the standard violates "the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual." *Tijani*, 430 F.3d at 1245 (Tashima, J., concurring); *accord Addington v. Texas*, 441 U.S. 418, 423 (1979).

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25. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L. J. 65, 78 (2011).

But the *Joseph* standard's fundamental flaw is that it does not permit the Immigration Judge to conduct an individualized hearing on flight risk and danger to the community. This inquiry is the touchstone of this Court's civil-detention cases. *Salerno v. United States*, 481 U.S. 739, 748–50 (1987). *Joseph*'s failure to even consider these matters demonstrates its inability to safeguard the constitutional rights of any Class member.

II. *Demore* did not consider whether an immigrant with a substantial defense to removal has a due-process right to a bond hearing.

Demore did not address the due-process rights of an immigrant asserting a substantial defense to a removal order. As explained below, immigration law distinguishes between *relief* from removal and *protection* from removal.[26] An immigrant who receives relief from removal has the right to remain in the United States. An immigrant who receives protection from removal obtains only a provisional stay of the execution of a

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26. The government declines to acknowledge this distinction in its brief. Petr. Supp. Br. at 8 n.1. But the government trains Immigration Judges on this very point of law. Charles A. Wiegand III, Fundamentals of Immigration Law 113 (rev. Feb. 2016) (excluding withholding of removal from "form of relief"), https://www.justice.gov/sites/default/files/pages/attachments/2016/03/03/fundamentals_of_immigration_law_-_feb_2016.pdf, https://www.justice.gov/eoir/immigration-judge-benchbook. And the government fiercely enforces the distinction between relief and protection from removal in its enforcement of the law. *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433–34 (BIA 2008) (holding that entry of a removal order is a necessary predicate to obtaining withholding of removal).

removal order. Kim, the immigrant in Demore, applied only for a form of protection from removal. As a result, this Court had no occasion to consider the due-process rights of an immigrant who attempts to rebut the charge of removability or who applies for permanent relief from removal.

Kim, the immigrant in *Demore*, initially applied for withholding of removal. Withholding of removal is a form of protection, not relief, from removal. An immigrant who obtains withholding accepts a final order of removal and is unable to obtain lawful permanent residence. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16; *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433–34 (BIA 2008). Indeed, an immigrant who has obtained withholding of removal may still be removed to a different, safe country. 8 C.F.R. § 1208.22. And the government may seek permission to execute the removal order if conditions change in the immigrant's home country. 8 C.F.R. § 1208.24. Thus, withholding of removal is not a complete defense to a removal proceeding.

The Court decided *Demore* assuming that Kim had conceded his removability, had foregone the opportunity to apply for permanent relief from removal, and had sought only withholding of removal. *Demore*, 538 U.S. at 522 n.6. *Demore* thus "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable." *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019–20 (7th Cir. 2004).

III. The due-process rights of immigrants who raise a substantial defense to removal justify affirming the District Court's injunction.

Amici agree with Respondents that the Court should affirm the District Court's injunction because Class members have a due-process right to a bond hearing in the face of prolonged detention. Moreover, the due-process rights of immigrants with a substantial defense to removal also support affirming the injunction in full. The Court may affirm the judgment below on "any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *accord Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). Because the vast majority of Class members raise a substantial defense to removal, affirmance of the injunction in full is appropriate.

However, if the Court declines to affirm the injunction in full, *amici* urge the Court to affirm it in part so as to provide bond hearings after no more than six months of detention to Class members who raise a substantial defense to removal.

CONCLUSION

For the foregoing reasons and those offered by Respondents and other *amici*, *amici* respectfully urge the Court to affirm the injunction.

Respectfully submitted,

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